Metropolitan Life Insurance Company *and* Insurance Workers International Union, AFL-CIO, Petitioner. Case 17-RC-9135

March 22, 1983

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered an objection to an election held on November 21, 1980,[1] and the Hearing Officer's Report on Objections With Findings and Recommendations recommending disposition of same. The Board reviewed the record in light of the exceptions and brief, and hereby adopts the Hearing Officer's findings and recommendations only to the extent they are consistent herewith.

The essential facts are not in dispute. Following the November 21, 1980,[2] election in the agreed-upon appropriate unit,[3] the Petitioner filed a timely objection to the election with the Regional Director for Region 17 of the Board. The objection alleged the following:

> On November 19, 1980, Mr. Lawarence [sic] Wilkerson, Regional Sales Manager, conducted a mandatory meeting of all the Sales Representatives in the district. Mr. Wilkerson made misleading and inaccurate statements concerning union policy on finding members. He stated that they would fine members as well as non-members. The Union did not have time to rebut his statements.

On December 4, the Regional Director ordered that a hearing be held on the issues raised by the objection. The hearing was held on December 16, and on December 31 the Hearing Officer issued his report.

The Employer is a New York corporation engaged in the sale of life insurance. The instant petition involves a unit of all sales representatives attached to the Employer's Jefferson City, Missouri, district office. Although there are approximately 17 unit employees attached to the Jefferson City district office, only about 4 of those 17 have offices at that location. The remaining 13 agents maintain offices in other cities and towns within the State of Missouri, including Columbia, Moberly, Fulton, Washington, Marshall, and Montgomery City. Some of these localities are located up to approximately 100 miles from the Jefferson City district office.

On November 19, 2 days prior to the election, the Employer's regional sales manager, Lawrence Wilkerson, conducted a mandatory meeting for all sales representatives attached to the Jefferson City district. The meeting was divided into two segments. The first session was open to all of the Employer's sales personnel and apparently dealt with business-related matters. The second session, however, was open to unit employees only and concerned the upcoming representation election. The Hearing Officer found that during the course of the second session Wilkerson announced that sales representatives within the unit who elected to continue working for the Employer during a strike could be fined by the Petitioner for doing so, even if they were not members of the Union.

Citing *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO [International Paper Box Machine Co.]*, 409 U.S. 213, 217 (1972), the Hearing Officer properly found that Wilkerson's statement was a misrepresentation of law. He further found that the statement in issue could reasonably have had a significant impact on the election and was made at a time which did not provide the Petitioner an adequate opportunity to make an effective reply.[4] Accordingly, the Hearing Officer recommended that the election be set aside and a second election directed, citing *General Knit of California*, 239 NLRB 619 (1978), and *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962). Although we agree with the finding that Wilkerson's statement was a misrepresentation of law, for the reasons stated below we disagree with the Hearing Officer's recommendation to set aside the election.

General Knit and *Hollywood Ceramics* recently were overruled in *Midland National Life Insurance Company*, 263 NLRB 127 (1982). In that case, we resolved to return to the sound rule announced in *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), under which we no longer probe into the

[1] The election was conducted pursuant to a Stipulation of Certification Upon Consent Election. The tally was: 5 for, and 10 against, the Petitioner; there were no challenged ballots.

[2] Unless otherwise noted, all dates refer to 1980.

[3] The unit is:

> All sales representatives, formerly known as Metropolitan Insurance Consultants, of the Employer attached to its Jefferson City, Missouri and its detached offices located in Columbia, Missouri, and Moberly, Missouri, but EXCLUDING canvassing, regular and office account agents, independent agents, retired sales representatives, district sales managers, sales managers, cashiers, clerical employees, secretaries, professional employees, guards, watchmen and supervisors as defined in the Act.

[4] In view of the result reached herein, we find it unnecessary to decide whether the Petitioner had an adequate opportunity to rebut Wilkerson's statement.

truth or falsity of the parties' campaign statements and do not set aside elections on the basis of misleading campaign propaganda. In essence, our recent holdings[5] establish that we will not set aside an election because of the substance of any representation, but will do so where a party uses forged documents which render the voters unable to recognize the campaign propaganda for what it is. Thus, it is not the substance of the representation which we will examine but the manner in which that representation was made. When made in a deceptive manner which renders employees unable to evaluate the propaganda for what it is, such as in cases of forgery, we will set aside the election. But where the representation is not made in a deceptive manner, we will not probe into the truth or falsity of any alleged misrepresentation.

Unlike *Midland National* and *Shopping Kart*, which involved alleged misrepresentations of fact, the instant case involves an alleged misrepresentation of law. However, we believe that the same policy considerations and rationale which formed the basis for our decision to return to the rule announced in *Shopping Kart* are equally applicable to situations involving misrepresentations of law. That a misrepresentation of law may involve a proffer of an allegedly "official" Board or court interpretation of law, or even an allegedly "official" law of this country, does not change the result. As we explained in *Riveredge Hospital*,[6] in such cases all that is present is one party's representation of what the law provides. It is the party, and not the Board, court, or law, speaking. As such, we deem that employees can recognize and evaluate such propaganda for what it is, and discount it.[7]

Applying the foregoing principles to the instant case,[8] there is no claim that Wilkerson's statement was made in a deceptive manner or involved the use of a forged document, and our review of the record convinces us that there is no basis for any such claim. Indeed, the record reveals that the alleged misrepresentation was made in the course of an oral presentation and as part of the Employer's preelection campaign propaganda. We thus find that the employees readily could evaluate Wilkerson's statements for what they were—propaganda. Accordingly, we shall overrule the Petitioner's objection and, as the Petitioner did not receive a majority of the valid votes cast in the election, certify the results of the election.[9]

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Insurance Workers International Union, AFL–CIO, and that said labor organization is not the exclusive representative of all of the employees, in the unit involved herein, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

MEMBER JENKINS, dissenting:

Contrary to my colleagues, I would adopt the Hearing Officer's recommendation to sustain the Petitioner's objection and to direct a second election on the basis of the Employer's misrepresentation of law.

Beyond my disagreement with the majority's decision to return to the flawed doctrine of *Shopping Kart*,[10] and apart from the administrative convenience provided by a mechanistic application of that case, there can be no reason to countenance egregious misstatements of law such as that made by the Employer in this case. The majority's claim that employees can recognize misrepresentations of law as being mere campaign propaganda is pure sophistry. The particular misrepresentation of law involved here was a patent misstatement of the employees' Section 7 right to refrain from engaging in union activities without fear of reprisal.[11] Rank-and-file employees, unschooled in the intricacies of Federal labor laws, cannot be assumed to recognize the falsity of statements purporting to be recitations of applicable law.[12] This particularly is true where,

[5] In addition to *Midland National*, see *Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital*, 264 NLRB 1094 (1982).

[6] *Supra.*

[7] *Midland National, supra*, citing *Corn Products Refining Company*, 58 NLRB 1441, 1442 (1944).

Our dissenting colleague finds a significant difference between misrepresentations of law and misrepresentations of fact. His distinction is based on employees' general unfamiliarity with the law and their concern about their legal rights as well as the assertion of the party making the misrepresentation of special knowledge about the law. None of these facts, however, serves to make a misrepresentation of law less obviously campaign propaganda than misrepresentations of fact. Misrepresentations typically involve matters about which employees have little or no knowledge and about which they are particularly concerned. And as often as not the misrepresentations are made by persons who assert some special knowledge. The crucial point remains that the employees know that an election campaign is underway and, in our view, are sufficiently mature to take the parties' statements as campaign propaganda which may be true or false or somewhere in between. Accordingly, there is no persuasive basis for drawing the distinction which the dissent urges upon us, and we decline to do so.

[8] See *Midland National, supra*, where we stated that in accordance with our usual practice, we would apply the holding of that case "to all pending cases in whatever stage."

[9] We see no reason to express an opinion on the hypothetical misrepresentations advanced by the dissent. We note, however, that in *Midland National* we cited *General Shoe Corporation*, 77 NLRB 124 (1948), and approved the "laboratory conditions" standard enunciated in that case.

[10] See Member Fanning's and my dissents in *Midland National Life Insurance Company*, 263 NLRB 127 (1982), and *Affiliated Midwest Hospital Incorporated, d/b/a Riveredge Hospital*, 264 NLRB 1094 (1982).

[11] See, generally, *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL–CIO [International Paper Box Machine Co.]*, 409 U.S. 213 (1972).

[12] See, e.g., *Jensen Sound Laboratories*, 258 NLRB 1314, 1317 (1981).

as here, the misrepresentation of law is made by one who, as the Employer's spokesman, is held out by the Employer to be knowledgeable in matters concerning the impact and effects of possible unionization. Under such circumstances, it is apparent that employees would attach added significance to statements made by such a spokesman concerning members' and nonmembers' legal rights and obligations in strike situations.

Even were I to accept the principles underlying the now-resurrected *Shopping Kart* doctrine, which I do not, I would not find that legal and factual misrepresentations should be governed by the same standards. My colleagues in the majority make the quantum leap of assuming that, since they find that employees can recognize and evaluate factual misstatements, employees similarly can recognize and evaluate legal misstatements. However, I submit that the majority's assumption is not well founded in fact or in law.

What employee reasonably would not be concerned about the provisions of applicable law concerning matters of utmost importance such as employee rights in strike situations? And what employee reasonably would not consider how that law affected him or could affect him? My colleagues ignore these considerations in the name of prompt finality of election results, the ease and predictability of a *per se* rule, and a fear of factual disagreements between the Board and the courts. While these considerations have certain facial appeal, none withstands scrutiny when weighed against the overwhelming purpose of the Act and the reason for which this Board exists—to preserve employees' free choice and guarantee their exercise of the rights granted them by the Act without fear of reprisal. This Board has the responsibility to keep a party from exerting undue influence on the electorate. The Act requires that an election be conducted in such a manner as to be a true and reliable indicator of employee sentiment. A Board-conducted election is not a contest between employer and union. Rather, its sole purpose is to give employees, through the secret-ballot process, an opportunity to make an informed and uncoerced decision as to whether they wish to be represented by a labor organization. These principles are not newly erected labor law theories—the Board has recognized them for over 35 years.[13] Yet my colleagues, with a callous sweep of their pen and notwithstanding their protestations to the contrary, brush all of this aside. I can regard my colleagues in the majority only as having adopted a "hear-no-evil, see-no-evil" approach to their quasi-judicial responsibilities.

The inevitable result of the majority's holding in the instant case, together with the holdings of a Board majority in *Midland National* and *Riveredge Hospital*, is to invite chicanery to take a rightful place in election campaign propaganda. Today the majority places its imprimatur on an employer's stating that this country's labor laws permit a union to fine nonmembers for crossing a picket line. Predictably, the same result would obtain despite misrepresentations of the law relating to strikers' reinstatement and recall rights, or misrepresentations of law concerning voting eligibility standards, or a misrepresentation of law that employees' wages and benefits must, by law, increase if the unit opts for representation by a labor organization. Quite conceivably, the majority holding in this case even would permit representing to employees that picketing activities are unprotected by the Act, or that employees are entitled by law to receive the normal wages from their employer for time spent attending union meetings or engaging in strike actions. None of these statements, standing alone, involves forged documents or contains threats violative of Section 8 of the Act. Accordingly, under the majority's approach those statements are unobjectionable, though wrong as a matter of law.

Unfortunately, we do not live in an Eden or Shangri-La. Absent reasonable regulation of campaign propaganda to prevent outright lies concerning material provisions of law, I fear that only the employees will suffer while each party attempts to gain some small advantage by making wildly inaccurate statements of law concerning whichever subjects are of greatest import to the electorate. In my view, only by sheerest happenstance could any election held under such conditions reflect the true desires of a majority of employees. Therefore, I dissent.

[13] See *General Shoe Corporation*, 77 NLRB 124 (1948).